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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-620.

GOVERNING BOARD OF THE TORRANCE UNIFIED SCHOOL DISTRICT,
PETITIONER,

v.

STANLEY M. LINDROS,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of California.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Questions Presented.

1. Has a state statute been drawn in question on the ground of its being repugnant to the United States Constitution, or has any right or privilege been specially set up under the United States Constitution so as to invoke this Court's jurisdiction under Title 28, United States Code, § 1257(3)?

2. Has a federal question of substance been decided so as to cause this Court to exercise its discretion to review this case under its Rule 19(1)(a)?

Statute Involved.

California Education Code, § 13443(d):

> "The governing board's determination not to re-employ a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof. The decision made after the hearing shall be effective on May 15 of the year in which the proceeding is commenced."[1]

Statement of the Case.

Although respondent generally accepts petitioner's statement of the case, two corrections must be made. First, respondent does not concede that proper procedures were followed in the proceedings below. However, since the California Supreme Court did not reach the procedural issues argued, there is no need to raise them here. Second, respondent admits that he raised certain constitutional arguments in his various California briefs. However, the petition, pp. 6-11, leaves the impression that these were the only issues raised. In fact, respondent made many arguments in his California briefs.

Regardless, it is the California Supreme Court's decision which is to be reviewed, not respondent's California briefs.

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[1] West's Annotated California Codes, Education; Added by California Statutes, 1965, c. 1110, p. 2755, § 2 as Education Code § 13443(e); renumbered as § 13443(d), by Cal. Stats., 1969, c. 1315, p. 2651, § 1.

Subsequent to petitioner's actions against respondent in this case, this statute was amended. See, Petition for a Writ of Certiorari to the Supreme Court of the State of California ("Petition"), Appendix E, pp. 68-72.

Reasons why a Writ of Certiorari should be Denied.

Not only is there no *substantial* federal issue in this case, there is simply no federal or constitutional issue at all.

Respondent, a probationary teacher employed by the petitioner for the year 1969-1970, was not reemployed by petitioner for the ensuing year 1970-1971 because he had read a theme to his English class which contained controversial language, and because he had once allowed students to return needed books to the library without proper authorization.

California statutory law provided that a governing board's decision not to reemploy a probationary teacher for the ensuing school year could be for cause only, and such cause had to relate solely to the welfare of the school and the pupils thereof.[2]

Petitioner argued that the facts of the case constituted "cause" under the statute; respondent argued that they did not.

The California Supreme Court decided that the facts of this case did not constitute "cause relate[d] to the welfare of the schools and pupils thereof" under the California statute. It was a simple matter of a state supreme court interpreting a state statute. No federal or constitutional question was decided.

First, there can be no doubt that the scope of the decision rested entirely on statutory grounds. Justice Tobriner's opinion for the Court begins with the following two paragraphs:

> "In this case we examine Education Code section 13443, which establishes the conditions under which the governing boards of local school districts may

[2] California Education Code, § 13443(d).

decline to rehire probationary teachers. At the end of the 1969-1970 academic year, the Governing Board of the Torrance Unified School District terminated petitioner Stanley Lindros, a probationary teacher, because he read a theme to his English class which contained controversial language, and because he allegedly on one occasion allowed students to return needed books to the library without proper authorization.

"For the reasons set forth below, we hold that these incidents fail to establish 'cause' for termination which is reasonably 'relate[d] to the welfare of the schools and pupils thereof' as required by section 13443, subdivision (d); in so doing we note that in both incidents Lindros acted in the good faith pursuit of concededly legitimate educational objectives, and that the Board demonstrated no significant adverse impact on the students or the school."[3]

Moreover, Justice Tobriner elucidated the Court's reasoning by an orderly presentation of the issues decided; all of them clearly related to the proper interpretation of the state statute. The headings of the presentation follow:

"I. The question whether alleged misconduct establishes 'cause' under section 13443, subdivision (d), constitutes a question of law.[4]

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[3] *Stanley M. Lindros* v. *Governing Board of the Torrance Unified School District* ("*Lindros* v. *Torrance*"), 510 P. 2d 361, 362-363, 108 Cal. Rptr. 185, 185-186 (1973), 9 Cal. 3d 524, rehearing denied July 12, 1973; Petition, Appendix B, pp. 6-7.

[4] *Id.*, 510 P. 2d 361, 366, 108 Cal. Rptr. 185, 190, 9 Cal. 3d 524, Petition, Appendix B, p. 17.

"II. The reading of 'The Funeral' did not constitute 'cause' under section 13443.[5]

"A. In reading 'The Funeral' petitioner sought to pursue a bona fide educational purpose and in so doing did not adversely affect the welfare of the school or the pupils thereof.[6]

"B. The reading was only a single incident in the presentation of teaching material which, although later deemed objectionable, was used in the absence of prior reasonable notice that such use would be deemed impermissible by the school authorities.[7]

"III. The incident involving dismissal of students on one school day fails to establish 'cause' reasonably related to the welfare of the schools and was not the true reason for the Board's refusal to rehire Lindros."[8]

Second, there are only two direct references in the entire 25-page decision to the Constitution, or to Supreme Court cases which discuss constitutional issues; both are by way of illustration, largely in the footnotes.[9] The California

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[5] *Id.*, 510 P. 2d 361, 367, 108 Cal. Rptr. 185, 191, 9 Cal. 3d 524, Petition, Appendix B, p. 21.

[6] *Id.*, 510 P. 2d 361, 368, 108 Cal. Rptr. 185, 192, 9 Cal. 3d 524, Petition, Appendix B, p. 21.

[7] *Id.*, 510 P. 2d 361, 369, 108 Cal. Rptr. 185, 193, 9 Cal. 3d 524, Petition, Appendix B, p. 25.

[8] *Id.*, 510 P. 2d 361, 370, 108 Cal. Rptr. 185, 194, 9 Cal. 3d 524, Petition, Appendix B, p. 27.

[9] The 25-page total is based on the decision reprinted in the Petition, Appendix B.

The first reference is:

"Finally, the United States Supreme Court has recognized the widespread use of current, divergent and distasteful patterns of speech, such as those involved here; indeed, in some situations that court has accorded constitutional protection to

Supreme Court used them only to put this case in context; for example, in one instance the California Court wanted to show that allegedly offensive language was common in

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similarly shocking and offensive language. *For example,* the Supreme Court recently held the phrase 'fuck the draft' protected by the First Amendment when portrayed on a jacket worn in a courthouse corridor. (*Cohen* v. *California* (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284.) Although *Cohen* involved a controversial term in expressing a political view in a public forum and is thus distinguishable from the instant situation, we note its reasoning: 'How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.' (*Cohen* v. *California, supra,* 403 U.S. at p. 25, 91 S.Ct. at p. 1788.)

"Three recent cases in which the Supreme Court vacated criminal convictions for offensive speech and remanded in light of *Cohen* v. *California, supra,* 403 U.S. 15, 91 S.Ct. 1280, 29 L.Ed. 2d 284, *illustrate* the same point. In *Rosenfeld* v. *New Jersey* (1972) 408 U.S. 901, 92 S.Ct. 2483, 33 L.Ed. 2d 321, the defendant was convicted of disturbing the peace by indecent and offensive language; he had addressed a school board meeting, attended by some 40 children, using, on several occasions in his speech, the words 'mother fucker'; in *Brown* v. *Oklahoma* (1972) 408 U.S. 914, 92 S.Ct. 2507, 33 L.Ed. 2d 326, the defendant, during a speech before a group of men and women in the University of Tulsa chapel, referred to policemen as 'mother fucking fascist pig cops'; in *Lewis* v. *City of New Orleans* (1972) 408 U.S. 913, 92 S.Ct. 2499, 33 L.Ed. 2d 321, a mother addressed police officers who had arrested her son as 'god-damned-mother-fucking-police.'

"These cases *illustrate* both the use of such speech in sections of our multifarious society and an increasing immunity from criminal sanctions for such expressions. While these rulings by no means legitimize the general use of offensive language in the classroom, they do *explain* the background and

our society. The Court's inclusion of these two references do not support the proposition that a federal or constitutional issue was decided.

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reasons for the use of such words in literary works depicting realistically the coarse and strident forms of communication that so often attend public dialogue today.[8]

[8] " 'If standards of taste of future generations are to be elevated it will not be accomplished by those who seek to sweep distasteful matters under the rug, or by self-embarrassed school trustees who discharge as unfit those who would bring the problem out in the open for discussion.' (*Oakland Unified Sch. Dist.* v. *Olicker* (1972) 25 Cal.App. 3d 1098, 1112, 102 Cal. Rptr. 421, 431 (Sims, J., concurring).) Several federal cases *illustrate* the serious constitutional questions which arise when school authorities seek to curb the academic freedom of teachers to employ techniques supported by substantial opinion in the teaching profession. (*Keefe* v. *Geanakos* (1st Cir. 1969) 418 F. 2d 359; *Parducci* v. *Rutland* (M.D. Ala. (1970) 316 F.Supp. 352.)"
(Emphasis added.) *Lindros* v. *Torrance*, 510 P. 2d 361, 368-369, 108 Cal. Rptr. 185, 192-193, 9 Cal. 3d 524, Petition, Appendix B, pp. 23-25.

The second reference is:

"We do not believe that one isolated classroom usage of material later deemed objectionable by school administrators, without reasonable prior notice, can constitute 'cause' for termination reasonably 'relate[d] solely to the welfare of the schools and the pupils thereof.' 'Cause' under section 13443 requires that the teacher must have failed to exercise such reasonable judgment as would be expected of a member of his profession under the same circumstances. 'Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach. Teachers are further protected by the fact that they cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed.' (*Morrison* v. *State Board of Education* (1969) 1 Cal. 3d 214, 233, 82 Cal.Rptr. 175, 189, 461 P. 2d 375, 389.) [10]

[10] "See *Oakland Unified Sch. Dist.* v. *Olicker* (1972) 25 Cal. App. 3d 1098, 1110, 102 Cal. Rptr. 421, applying the

Indeed, because the California Supreme Court's decision depended so little on federal law or the Constitution, petitioner is forced to quote extensively from several of respondent's briefs before the California courts in an effort to manufacture a constitutional or federal question.[10] Obviously such an argument must fail, for it is the California Supreme Court's decision, not respondent's briefs, that petitioner wants reviewed. Moreover, if this decision is reviewable, any decision by any state court interpreting any state statute would be reviewable simply because one of the litigants raised a constitutional argument in his briefs.

Third, Justice Burke dissented. He did not, however, state that any constitutional or federal question was decided in this case, as he so easily could have. Instead, he accepted the fact that this was a case of a California court interpreting a California statute. His only argument was that the majority's understanding of the legislative intent was improper. His first paragraph follows:

"I dissent. The majority have wholly emasculated the provisions of section 13443, subdivision (d), of the

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same reasoning as to lack of notice to a teacher dismissal case under Education Code section 13403. Several federal cases, moreover, have accepted the notice argument in the context of constitutional due process and academic freedom challenges to teacher dismissals. (See *Mailloux* v. *Kiley* (D. Mass. 1971) 323 F. Supp. 1387, affd. 448 F. 2d 1242 (1st Cir.); *Keefe* v. *Geanakos* (1st Cir. 1969) 418 F. 2d 359, 362; *Webb* v. *Lake Mills Community School Dist.* (N.D. Iowa 1972) 344 F. Supp. 791, 800-801, 804-805; *Parducci* v. *Rutland* (M.D. Ala. 1970) 316 F. Supp. 352, 357; cf. *President's Council, Dist. 25* v. *Community School Board* (2d Cir. 1972) 457 F. 2d 289, 293-294.)."

Lindros v. *Torrance*, 510 P. 2d 361, 370, 108 Cal. Rptr. 185, 194, 9 Cal. 3d 524, Petition, Appendix B, pp. 26-27.

[10] Petition, pp. 6-9.

Education Code which, until now, assured that a local school board's decision as to the sufficiency of the cause for failing to reemploy a probationary teacher was *conclusive* and free from judicial interference. The 'cause' which led defendant district to refuse to reemploy Lindros was his *classroom* use of improper, indecent language. Since the use of such language in the tenth-grade classroom obviously is a matter of relating to 'the welfare of the schools and the pupils thereof,' (Ed.Code, § 13443, subd. (d)), the district's determination concerning the sufficiency of that cause should have been 'conclusive.' (*Id.*) Instead, the majority have rendered that determination wholly *inconclusive* by relying upon a variety of supposedly mitigating factors (such as Lindros' asserted 'good faith') which more properly were matters of sole concern to the district in appraising the sufficiency of the cause for terminating Lindros' services. More importantly, however, and wholly apart from the particular circumstances surrounding this case, the majority's approach can be employed in future cases involving probationary teachers to undermine and defeat the clear legislative intent to vest in the local school board plenary control over these matters." (Emphasis in original.)[11]

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[11] *Lindros* v. *Torrance*, 510 P. 2d 361, 372-373, 108 Cal. Rptr. 185, 196-197, 9 Cal. 3d 524, Petition, Appendix B, pp. 31-32.

Conclusion.

In sum, there is simply no federal or constitutional question to review.

Respectfully submitted,

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